

Fairness, Justice and Databases for Indigenous Knowledge and Culture

Professor Natalie Stoianoff

Director, Intellectual Property Program
University of Technology Sydney

WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) in 2000. For almost two decades, the quest of the IGC has been the development of model *sui generis* or stand-alone regimes as draft treaties to protect each of the three forms of subject matter, namely, traditional knowledge, genetic resources and traditional cultural expressions. This quest is in recognition that conventional, Western intellectual property laws provide either inadequate and/or inappropriate forms of protection for Indigenous knowledge and culture.¹

The rationale for the IGC taking such steps can be couched in terms of corrective justice,² a recognition of the need to 'right past wrongs' suffered by Indigenous communities due to, among other things, the misappropriation of their cultural knowledge.³ This demonstrates that 'fairness' in this context is aligned with the need to protect "least advantaged" members of society. Rawls calls this the theory of "justice as fairness".⁴ Meanwhile, Hart emphasises the fair distribution of benefits and burdens⁵ as the moral purpose of the principle of fairness which tries to address the issue of 'free riding'.

The IGC's draft model protection regimes provide the custodians of Indigenous or traditional knowledge and culture with the mechanism to counteract potential 'free riding' in relation to that knowledge. However in order to achieve this protection, these regimes encourage the creation of registers or databases of the knowledge or cultural expression to be protected. This paper analyses the potential problems created by the use of such registers or databases. Copyright may subsist in these registers and databases separately to the knowledge or information contained therein, but who owns or controls them? How does that impact the rights of the Indigenous people whose knowledge is recorded in such databases? Can the concept of fairness assist with this enquiry?

¹ Natalie P. Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia – The Case for Sui Generis Legislation' (2015) 41 Monash University Law Review 745, 746.

² Stephen R Munzer, 'Corrective Justice and Intellectual Property Rights in Traditional Knowledge' in Annabelle Lever (ed), *New Frontiers in the Philosophy of Intellectual Property* (Cambridge University Press, 2012) 58.

³ Terri Janke, 'Biodiversity, Patent and Indigenous Peoples' (26 June 2000) [2.1] <<http://sedosmission.org/old/eng/JankeTerry.htm>>.

⁴ John Rawls (1971). *A Theory of Justice*. Cambridge, Mass.: Harvard University Press, 12.

⁵ Hart, H. L. A (1955). "Are There Any Natural Rights?" *Philosophical Review*, 64: 175-91.